

## **ANTIDEGRADATION STAKEHOLDERS' SUBGROUP**

### **MEETING SUMMARY**

Date: October 30, 2008  
Time: 10:00 A.M. – 1:00 P.M.  
Location: IDEM's Shadeland Avenue Offices, Conference Room C

#### **Present at the meeting:**

Brett Barber (Greeley & Hansen), Dave Bates (City of Goshen), Patrick Bennett (Indiana Manufacturer's Association (IMA)), Bill Beranek (Indiana Environmental Institute), Laura Bollinger (Indiana Environmental Institute), Mark Brook (Conservation Law Center), Kevin Doyle (AccelorMittal), Albert Ettinger (Environmental Law Policy Center (ELPC)), Kari Evans (Barnes & Thornburg), Lori Gates (Christopher Burke Engineering), Jeff Hyman (Conservation Law Center, Alliance for the Great Lakes), Barton Jones (Strand Associates, Inc.), Tim Lohner (AEP), Kay Nelson (Northwest Indiana Forum), Dan Olson (Michigan City Sanitary District), Neil Parke (Eli Lilly), Dave Pfeifer (U.S. EPA, Region 5), Dan Plath (NiSource), Bowden Quinn (Sierra Club Hoosier Chapter), Dave Wagner (WPCB), Craig Williams (City of Angola).

Representing IDEM: Bruno Pigott, Martha Clark Mettler, Steve Roush, Dennis Clark, Shivi Selvaratnam, John Elliott, John Nixon, and MaryAnn Stevens.

#### **Introductions and Review of Summary**

After an introduction by each person in attendance, Martha Clark Mettler, IDEM, Office of Water Quality, Deputy Assistant Commissioner, asked if anyone had comment on the draft summary of the September 16<sup>th</sup> subgroup meeting. The only comment came from Neil Parke who asked for more detail about unused loading capacity.

#### **Next Meeting Topic**

Martha suggested that the most appropriate topic for the next subgroup meeting would be a discussion on what should be required in an antidegradation demonstration.

Brett Barber asked that IDEM circulate information to the subgroup members about what other states require. Martha agreed and said IDEM would prepare a draft concept of what an application for antidegradation demonstration would contain.

#### **Agenda: Presentations by Interested Parties**

Today's subgroup meeting was set up to allow the three interested parties to give presentations on their positions regarding antidegradation. An alphabetical order of presentation was agreed upon with the environmental community leading off, followed by the industrial group, and concluding with the municipal group. In preparation for the presentations, each interested party submitted their responses to the homework assignment plus other supporting materials. Those documents are attached and incorporated into this meeting summary.

#### **ENVIRONMENTAL COMMUNITY PRESENTATION by Albert Ettinger with support from Jeff Hyman and Bowden Quinn**

Refer to the attached documents:

- Responses of Environmental Groups to IDEM's Antidegradation Subgroup homework assignments
- Summary of Environmental Coalition Proposals for IDEMS's Proposed Section 4(b) Antidegradation Exemptions (October 15, 2008)
- DRAFT RULE- ENVIRO COALITION DE MINIMIS PORPOSAL-10/15/08

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Albert Ettinger referred everyone to the specific wording in the documents prepared by the environmental community rather than rephrasing it. He did make some additional comments:

Regarding Assignment 2 concerning the definition of “pollutant of concern”, Albert said the environmental community likes Iowa’s definition but not as used in the industrial group’s proposal because he feels it introduces ambiguity.

Albert talked about finding a practical approach to de minimis whereby it would be easier to do an antideg demonstration than for IDEM permit writers to calculate percentages for every POC discharge.

#### **Q&A**

Kari Evans asked about the environmental community’s section 4(b) table of exemptions and how the expressed justification requirements relate to advance public notification and comment period. Jeff Hyman stated that the justification would be an explanation provided to IDEM with IDEM having the ability/responsibility to ask for further justification, not just accepting the discharger saying the intake water contains the pollutant. He trusts the agency will ask for a proper amount of justification. The public is at least due notice that there is an increase pollutant in the intake and therefore in the discharge.

Kari asked if the notice is different from the notice of the draft permit; Jeff answered that it wouldn’t necessarily be a different notice. He thinks further discussion about what is an adequate notice is necessary (details on the content of the notice and how much in advance). Jeff thinks some notice may be part of the permit notice, but advance public notice before the permit is available may also be necessary.

Albert stated that he thinks the use of the term “exemption” to describe an activity that is necessary to accommodate an important social or economic benefit is a misnomer. Rather than an exemption, it is a type of an antideg analysis.

Kari asked what is meant by simultaneous guidance document. Albert answered that he envisions a guidance document for the antideg rule to be developed along with the rule.

Kari questioned Albert about his statement that the industrial group’s use of the Iowa definition of POC is ambiguous. She disagrees with Albert.

#### **INDUSTRIAL PRESENTATION by Kari Evans with support from Tim Lohner and Neil Parke**

Refer to the attached documents:

- IWQC antideg homework assignment 10-20-08
- IWQC Attachment 1 applicability
- IWQC Attachment 2 POC
- IWQC Attachment 3 second notice comments 5-30-05
- IWQC Attachment 4 1<sup>st</sup> notice comments 4-29-03
- IWQC Attachment 5 WQAG exceptions
- IWQC Attachment 6 air pollution controls
- IWQC Attachment 7 variances
- IWQC Attachment 7a 316a

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Kari referred to the industrial group's consistent position as laid out in the listed documents. Kari's initial issue is with the current antideg draft rule applicability statement that she says is a deviation from prior policy. The trigger should be a new or increased discharge that requires a new or modified NPDES permit.

The industrial position on POC is that there needs to be a reasonableness threshold tied to designated uses.

The industrial presentation doesn't include a completed exemption table. Kari stated the industrial position is that exemptions that capture changes in day to day operations shouldn't need separate justification. All others would require the discharger to provide justification, which IDEM would include in the permit fact sheet.

The draft permit public notice and comment period should be the time for discussing the antideg issue rather than waiting for the final permit.

The industrial group is accepting of a simultaneous guidance document as long as its development doesn't bog down the rulemaking process.

On general permits, Kari said the industrial group isn't presently wedded to one particular course of action but wants to make sure general permits get addressed in this antideg rulemaking. Kari wanted to make clear that the time to address antideg is when a general permit rule is put in place so specific activities qualifying for a general permit do not need to go through individual antidegradation review.

Tim Lohner, on air pollution controls, said there is little value in requiring an antideg demonstration for air equipment required under air pollution control rules. Tim agreed there is a need to address these type requirements while technical effluent guidelines are under review.

The industrial position is that variances should be excluded from antideg review since the analysis for establishing a variance is nearly the same as an antideg review.

The industrial position is that the rulemaking should continue to use the terms "unused loading capacity" and "total loading capacity," to define de minimis, and should not change the term to "assimilative capacity".

The industrial position relies on SEA 431 so that no antideg review is needed if the increase is below the de minimis and that de minimis should also apply to OSRWs with the extra requirement of providing overall water quality improvement. Tributaries to OSRWs and EUWs should be treated the same as HQWs with impact effects to the OSRW/EUW studied on a case by case basis, not with regard to an arbitrary two mile standard.

Neil Parke spoke against using the FAV as the ceiling for a de minimis discharge. He referred to the use of diffusers where the water speed is such that organisms can't get into or stay in position long enough to experience enough exposure to warrant concern.

Kari also discussed the Kentucky antidegradation case, and explained that portions of the opinion implying that a de minimis (including the cumulative cap) cannot exceed 10% are the views of

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only one judge in the case, and that the majority holding of the court is provided in the concurring opinion. The concurring opinion remands the decision back to EPA to better explain how the exceptions in Kentucky's rule meet the de minimis standard.

#### **Q&A**

Jeff Hyman asked Kari if chemicals for which there isn't enough known in order to know if they are harmful are the chemicals that the industrial group wants to exclude from the POC definition. Kari responded yes plus chemicals occurring at small levels should be excluded. Kari gave as an example the household use of pharmaceuticals and personal care products.

Albert Ettinger suggested a general permit on existing discharges may be needed for new dischargers of those type of discharges. He cited the Kentucky ruling example of coal mines after the court case are no longer eligible for a general permit but must get an individual permit. Kari and Albert agreed a special meeting is needed on general permits under antideg.

Albert asked if the variance process is actually the same as the antideg demonstration review. If it is, including having the same public notice requirements, he has no objection to an exemption for variances.

Bowden Quinn questioned Neil Parke about non-mobile organisms such as mussels being exposed no matter what is the water speed. Neil responded that a mixing zone cannot include the bottom surface. Albert stated the mixing zone rules need to be considered.

#### **MUNICIPAL PRESENTATION by Dan Olson**

Refer to the attached documents:

- Municipal Stakeholder Responses (10-30-08) Version 1.1
- Municipal 10-30-08 Effluent Limits vs FAV for OSRW or EUW
- Municipal 10-30-08 Effluent Limits vs FAV

Dan Olson gave a succinct presentation accompanied by the handout of the power point slides found in Municipal Stakeholder Responses (10-30-08) Version 1.1.

Dan said a big issue for the municipalities is that exemption 8 should require no further justification when the increase in sewered area is within the design flow of the existing discharge permit.

#### **Q&A**

Albert Ettinger complimented Dan for giving the most concise, to-the-point presentation, which resulted in no questions being asked.

#### **EPA Reaction to Presentations – Dave Pfeifer**

Martha asked Dave Pfeifer, EPA Region 5, for his comments on the presentations given at today's subgroup meeting. Dave was brief, said EPA needs time to digest what was presented, and offered that litigation on the Great Lakes Initiative could affect antidegradation, such as proposals on BCCs that were never adopted.

#### **Subgroup Wrap up Discussion on Presentations**

Albert Ettinger wanted to comment on three points of contention with Kari Evan's industrial presentation:

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- Two federal judges said anything like a 90% cap would not be approvable.
- IDEM should not consider volume discharge to Lake Michigan as an exception (a reference to the BP permit).
- There is a need to consider antideg assessment of emerging pollutants (reference to small quantities and chemicals with little known about their pollutant status).

Kari questioned whether IDEM is planning to make interim decisions on any antideg discussion topic before the subgroup moves on to another topic.

Albert thought there is danger in interim decisions because they might conflict with future topic decisions.

Martha asked if stakeholders would agree to an end point if IDEM did make interim decisions. Bruno reminded the subgroup that today's meeting was a process to allow each interested group to present its point of view. If there is no agreement in the end, then IDEM will make the rule decisions.

Kari agreed it is a chicken and egg dilemma, but she also said the regulated community has reservations such as agreeing to requirements for antideg demonstration if the antideg rule requirements are not established.

Dave Wagner asked IDEM to prepare a revised rulemaking completion schedule and present it to the next Water Pollution Control Board meeting.

Albert reminded IDEM of the need to schedule a meeting fairly soon on the topic of general permits.

Bowden Quinn commented on what he sees as confusing redundancy in exemptions because they don't require a new or revised permit. He thinks public notice and comment is needed earlier in the process than at the draft rule stage.

Dan Olson suggested that continued discussion should be limited to new topics and to let IDEM make decisions based on information provided thus far on the topics already discussed.

**NEXT STEPS**

The next subgroup meeting is tentatively scheduled for Thursday, December 11, 2008, from 10 am to 4 pm, at IDEM's Shadeland Avenue office, Conference Room C.

IDEM will send out a draft concept of what an application for antidegradation demonstration would contain and information on other states' requirements.

IDEM will prepare a revised rulemaking schedule to present at the next WPCB meeting.

**Summary of Subgroup Consensus from this Meeting**

No agreements were reached at this subgroup meeting.